No. 863.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CENTRAL TRUST COMPANY, OF NEW YORK (a corporation), and the HELENA POWER AND LIGHT COMPANY (a corporation),

Appellants.

vs.

JOHN W. WARREN,

Appellee.

APPELLANTS' BRIEF.

BUTLER, NOTMAN, JOLINE & MYNDERSE,

H. G. & S. H. McINTIRE,

Solicitors for Appellant, Central Trust Company.

H. S. HEPNER,

Solicitor for Appellant Helena Power and Light Company

FILED
SEP -2 1902

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STATEMENT OF THE CASE.

This is an appeal from so much of a decree entered in favor of appellant, the Central Trust Company, upon the foreclosure of a mortgage or deed of trust dated January 1, 1895, made to it by the Helena Power and Light Company, as gives priority, over the claim of said appellant to a judgment entered June 1, 1901, in favor of appellee and against said Helena Power and Light Company for personal injuries. The case in the lower court was heard and determined on the bill of complaint, taken as confessed by defendant, the Helena Power and Light Company, and the answer of appellee, Warren. The facts as shown by said bill of complaint, so far as the same are

material to this appeal, are as follows: The Helena Power and Light Company is a corporation organized under the laws of the State of Montana with its place of business at Helena in that state; on or about January 1, 1895, for the purpose of securing the payment of certain coupon bonds issued by it, said Helena Power and Light Company duly executed a mortgage or deed of trust to appellant, the Central Trust Company, as trustee, the same was duly delivered and was recorded in the proper office on May 7, 1895 (the mortgage is attached to and made a part of the bill of complaint and is found on pages 13-42 of the printed record herein); of the bonds secured by said mortgage or deed of trust $425,000.00 had been issued and were outstanding at all the times hereinafter mentioned; there had been several defaults of the interest due on such bonds from January 1, 1900 down, and said Helena Power and Light Company was insolvent, whereupon, acting under the terms of the mortgage or deed of trust, the appellant, Central Trust Company of New York, on October 15, 1901, instituted this action in the Circuit Court for the District of Montana to foreclose the same and to subject the property therein mentioned to the payment of the debt secured thereby. The prayer of the bill is in the usual form. Appellee, John W. Warren, was made a party defendant to the suit, it being alleged in the bill of complaint that he "has or claims some interest in or lien upon said real property of the Helena Company, but the said claim or lien, if any there is, is subsequent to the lien of said mortgage or deed of trust" (Record p. 9). As it will be necessary to refer to said

mortgage or deed of trust, we give a brief summary of such portions of it as appear to be material. It recites that the grantor, the Helena Power and Light Company, is a corporation duly incorporated under the laws of the State of Montana and having its principal place of business at the City of Helena therein; that the issue of the bonds therein mentioned and such mortgage or deed of trust to secure the same had been duly authorized, and that all the property of the said company was thereby conveyed as such security, such property, as the description shows (Record pp. 17-26) consisted of town lots, certain grants by the city of Helena of the right and privilege of manufacturing and selling gas throughout said city, a "certain railway and franchise situate in said city of Helena" the same being described (Record pp. 22-25) and also all the personal property, enumerating the same, franchises, grants, rights, easements and privileges owned and enjoyed by the said grantor company (Record pp. 25-26), then follow the terms and conditions of said mortgage or deed of trust. Appellee Warren, was duly served with subpoena and appeared and filed his answer to said bill of complaint. Such answer is found on pages 46-53 of the printed record. Said answer (Record pp. 45-48) recites that Warren on June 4, 1901 had obtained a judgment in the State court against said Helena Power and Light Company for $2,634.80; "that the said Helena Power and Light Company is, and at all times since on or about the 1st day of January, 1895, and down to the time of the filing of the complaint herein has been, engaged in operat-

ing lines of street railway in and over the streets of the city of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas lighting to the said city of Helena and the inhabitants thereof, the electric lighting being furnished by means of wires strung through the streets of the said city of Helena, and the gas through pipes and mains laid through the streets of the said city of Helena, and that the said defendant Helena Power and Light Company has so and for such purposes occupied the said streets and conducted the said business under franchises to it granted by the said city of Helena under authority of acts of the legislature of the State of Montana, and under franchises granted by virtue of the general laws of the State of Montana.

"And this answering defendant further avers that all of such franchises were granted to the said defendant Helena Power and Light Company since the year 1889, and that none of them were granted to or exercised by it prior to said year 1889. This answering defendant further avers that all the property mentioned in the mortgage attached to the bill of complaint herein was at the time of the commencement of this action, and at all times had been, held by it, so long as it held the same, under such franchises so as aforesaid to it granted.

"This answering defendant further avers that the liability of said Helena Power and Light Company to this answering defendant, which was the foundation of the judgment above referred to, recovered by this answering defendant against the said Helena Power and Light Company, was incurred by the said Helena Power and Light

Comanpy in the operation, use and enjoyment of the franchises hereinbefore referred to as granted to it by the said city of Helena, and that the facts constituting the said liability are set out in the complaint of this answering defendant in the action hereinbefore referred to, in which said judgment was rendered, a copy of which complaint is hereto attached, marked exhibit "A" and by this reference made a part of this answer."

Exhibit "A", the complaint in the State court in Warren vs. Helena Power and Light Company, attached to and made a part of said answer, contains the following averment (Record pp. 50-52): "That the defendant is, and at all times hereinafter mentioned, was, a corporation organized and existing under and by virtue of the laws of the State of Montana, and during all of said time was, and still is, the owner of, and in the possession of, a certain street railway road, which is run and operated by the defendant along and upon Helena Avenue in the city of Helena, County of Lewis and Clarke, State of Montana, and other streets of said city, together with the track, rolling stock and appurtenances thereunto belonging," and also other averments showing that the above judgment was rendered on a claim for personal injuries resulting from the negligent operation of the street railway of said Helena Power and Light Company upon one of the streets of the city of Helena on or about August 15, 1900.

The said answer in the foreclosure suit, further continuing contained the following (Record p. 49): "This answering defendant denies that the defendant Helena

Power and Light Company was or could be authorized or empowered to execute or deliver any mortgage of the property mentioned in the complaint, the lien of which is or could be superior to the lien of this answering defendant's judgment; and this answering defendant denies that the lien of this defendant's said judgment is subsequent or inferior to the lien of the mortgage or deed of trust referred to in the bill of complaint.

"Wherefore, this answering defendant consents to an immediate sale of the property of the said defendant Helena Power and Light Company, as prayed for in the complaint, but respectfully prays that his said judgment may be adjudged to be a lien upon the property of the said defendant company within the County of Lewis and Clarke, State of Montana, superior to the lien of the complainant's mortgage, and that it be decreed that out of the proceeds of the sale of the said property of the said defendant company the amount of the judgment of this answering defendant be first paid, together with his costs herein, and that this answering defendant have such other and further relief as to the Court may seem just."

The bill of complaint was taken as confessed by the defendant Helena Power and Light Company, and as to defendant Warren a motion for a decree, notwithstanding his said answer, was made (Record pp. 54-55.) This motion the Circuit Court denied (Record p. 56.) And afterwards a decree was entered herein (Record pp. 57-72.) Such decree recites, *inter al.*, (Record pp. 60-61):

"That the said mortgage or deed of trust set forth in the bill of complaint herein of the complainant, Central

Trust Company of New York, made by the defendant Helena Company to said complainant and bearing date January 1, 1895, is a valid and subsisting mortgage, and constitutes a valid and subsisting lien upon the mortgaged property, premises and franchises, subsequent only to the lien of the judgment of the defendant John W. Warren upon the real estate as follows;" and (Record p. 63): "The claim of the defendant John W. Warren is a lien upon said real property of the Helena Company, prior to the lien of said mortgage or deed of trust," and after ordering a foreclosure of said mortgage or deed of trust and a sale of the property therein mentioned, it provides that from the proceeds of such sale, after deducting the costs of the foreclosure suit and before payment of any portion of the judgment found in favor of appellant, Central Trust Company.

"Second.—To the payment in full of the judgment of the defendant John W. Warren referred to in his answer in the sum of $2,663.89, with interest thereon to the date of payment from the date of this decree at the rate of eight per cent per annum" (Record p. 69.)

Thereupon the appellants duly perfected this appeal from such part of said decree whereby it was adjudged that the claim of appellee was a prior lien to the said mortgage or deed of trust, and whereby it was ordered that said claim of appellee should be paid from the proceeds of a sale of the mortgaged property before the payment of the amount found due upon said mortgage or deed of trust. The assignment of errors is contained on pages 75-78 of the printed Record, and is as follows:

"Come now the complainant in the above entitled cause, Central Trust Company of New York, by its solicitors, and also said defendant, Helena Power and Light Company, by its solicitor, and say that in the decree of the court herein made and entered on the 8th day of April, 1902, in favor of defendant John W. Warren, and in the record and proceedings therein, there is manifest error, and file the following assignment of errors committed or happening in said cause, and upon which they will rely on their appeal from that portion of the said order and decree made and entered on the 8th day of April, 1902, in the above entitled cause, whereby it was adjudged that the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the said complainant, and whereby it was ordered and adjudged that the said judgment of said defendant Warren should be paid out of the proceeds of the property ordered sold under said decree prior to the payment of the amount found due and ordered paid upon the mortgage or deed of trust foreclosed in said decree:

I.

"The court erred in denying the motion of the complainant for a decree in its favor as prayed for in its bill of complaint, notwithstanding the answer of the defendant John W. Warren, because the said answer contains and presents no defense to said bill of complaint.

II.

"The court erred in granting affirmative relief to said defendant John W. Warren upon his answer because said

answer does not contain facts sufficient to entitle him to such or any affirmative relief.

III.

"The court erred in making and entering its decree in that portion thereof which adjudged that the judgment of the defendant John W. Warren is a prior lien to the mortgage or deed of trust of the complainant upon the property of the defendant Helena Power and Light Company.

IV.

"The court erred in making that portion of its said decree which orders that the amount of the said judgment of the defendant John W. Warren be paid out of the proceeds of the sale of the property of the defendant, Helena Power and Light Company, before the payment of the amount found due upon the mortgage or deed of trust of the complainant.

V.

"The court erred in holding, as it does in said decree, that the judgment in favor of defendant John W. Warren and against the defendant Helena Power and Light Company for the latter's negligent acts, which judgment was made and entered on June 4, 1901, and which is set up and relied upon by him in his answer herein, is a prior and superior lien upon the property described in and covered by the mortgage or deed of trust of the said Helena Power and Light Company to the complainant, which was made and executed and delivered on January 1, 1895, and to foreclose which the present action was and is brought.

VI.

"The court erred in granting affirmative relief to the defendant John W. Warren upon his answer because in said answer the affirmative relief sought by said defendant is not pleaded or set up by cross-complaint as required by the rules of pleading in equity.

"Wherefore, the said complainant, Central Trust Company of New York and the said Helena Power and Light Company pray that the portion of said decree adjudging that the said judgment of defendant John W. Warren is a prior lien to the complainant's mortgage or deed of trust upon the property therein described, and is entitled to payment from the proceeds of the sale of such property before the payment of the amount due upon complainnat's said mortgage or deed of trust, and ordering and adjudging that said judgment of said defendant Warren should be paid out of the proceeds of the property ordered sold under said decree prior to the payment of the amount found due and ordered paid upon the mortgage or deed of trust of complainant foreclosed by said decree, and all thereof, be reversed, set aside and held for naught."

ARGUMENT.

I.

Upon the argument of the motion for judgment in favor of appellant Central Trust Company notwithstanding the answer of appellee, Warren, (Record pp. 54-55) it was conceded by the latter's counsel that appellee was not entitled to relief by reason of the provisions of section 707 of the Compiled Statutes of 1887 of the State of Montana

which section has been retained and is now section 914 of the Civil Code of that state, found in the chapter relating to railroad corporations, and which reads: "Section 914. A judgment against any railroad corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shal be prior and superior to the lien of any mortgage or truse deed provided for in this chapter," in view of the decision of this Court in Massachusetts Loan and Trust Company vs. Hamilton, 88 Fed. 589 in which it was held that such section had no application to street railways nor to corporations operating the same, but that he would base his right to recover upon the provisions of section 17 of Article XV of the Montana Constitution, which reads as follows:

"Section 17. The legislative assembly shall not pass any law permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

It was upon this contention that said motion was submitted. The Judge of the Circuit Court in overruling the motion filed no written opinion but said that he did not consider that said section of the Montana Constitution had any application; that the present case was distinguishable from the Hamilton case (88 Fed. 589) in that the

Helena Power and Light Company was a Montana corporation, necessarily incorporated under the statutes of that state relating to the incorporation of railroad corporations, as there was no other law in that state prior to the adoption of the Civil Code, which was approved February 19, 1895, under which a corporation to transact a street railway business could be organized, and that consequently said Helena Power and Light Company and its property was subject to all the laws of the state, relating to railroad corporations, including said section 707 of the Compiled Statutes of 1887. He also further stated that there was enough in the bill of complaint to show that said defendant company was incorporated under the railroad laws of the State.

In submitting our views to this Court we shall contend, first, that the defendant Helena Power and Light Company is not a railroad company, but is one authorized by the general incorporation laws of the state in force prior to July 1, 1895, relating to corporations for industrial and productive purposes, that said section 707 of the Compiled Statutes of Montana has no application to the case, in short, that the case is not distinguishable from the Hamilton case *supra*, second that section 17 of Article XV of the Montana Constitution has also no application, and third that the judgment appealed from is erroneous and should be reversed.

First. There is no dispute as to the validity of the mortgage or deed of trust to foreclose which the present action was instituted nor of the fact that the grantor therein named, the Helena Power and Light Company,

was at the time of its execution and delivery a duly incorporated company under the laws of the State of Montana. It is further expressly averred in the answer of appellee, Warren, (Record p. 47) "that the defendant Helena Power and Light Company is, and at all times since on or about the 1st day of January, 1895, and down to the time of the filing of the complaint herein has been, engaged in operating lines of street railway in and over the streets of the city of Helena, Lewis and Clarke County, Montana, and in furnishing electric and gas lighting to the said city of Helena and the inhabitants thereof," and it is further expressly averred in said answer (Record pp. 50-52) that the act constituting the basis of appellee's claim arose from the negligent operation of its said street railway line subsequent to said mortgage or deed of trust. Prior to July 1, 1895 the laws of Montana relating to the forming of incorporations were embodied in the Compiled Statutes of 1887. Section 446 p. 724 of those statutes after enumerating certain purposes for which corporations might be formed, and which do not in express terms include either the manufacture or furnishing of gas, electricity or the operation of street railways, provided that any three or more persons might form a company for the purpose of "carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of one or more of the aforesaid branches of business." The statutes of Montana then in force relating to the formation of railroad corporations were contained in Chapter XXXV (erroneously designated XXV) on pages 807-824 of such Com-

piled Statutes. Section 677 p. 808 of such statutes reads: "Any number of natural persons, not less than five, may become a body corporate for the purpose of locating, constructing, maintaining, and operating railroads with all the rights, privileges and powers conferred by, and subject to all the restrictions of, this chapter," and section 678 p. 809 contains the following: "That any number of persons as aforesaid, asociating to form a corporation for the purposes named in section 677 of this chapter, shall under their hands and seals make a certificate which shall specify as follows:

First. The name of such corporation, by which it shall be known.

Secondly. The name of the county or counties, and territory or territories, where the termini of said road are to be located, and the county or counties, and territory or territories, through which such road shall pass and the general route of said road.

Thirdly. The amount of capital stock necessary to construct such road."

The only provisions of the law of Montana then in force relating in any way to street railways *co nomine* were section 12 of Article XV of the Constitution which reads: "No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad" and subdivisions XIV and XVI of section 325, p. 683, of the Compiled Statutes relating to Municipal Corporations, which empower city councils:

"XIV. To regulate and control the laying of railroad tracks and prohibit the use of engines and locomotives propelled by steam, or to regulate the speed thereof when used."

"XVI. To license and authorize the construction and operation of street railroads and require them to conform to the grade of the streets as the same are or may be established."

The aforesaid statutes of Montana relating to railroad corporations, and especially those numbered sections 702 to 707 inclusive, were carefully and fully analyzed and explained by this Court in the case of Massachusetts Loan & Trust Co. vs. Hamilton, 88 Fed. 593-595 and were shown not to be applicable to corporations formed for the purpose of operating street railways.

See also Board of R. R. Comr's vs. Market St. Ry. Co. (Cal.) 64 Pac. 1065.

Ferguson vs. Shurman, 116 Cal. 169 s. c. 47 Pac. 1023.

Now in this case we have not a corporation formed for that purpose alone, but one which included in its business objects also, as is averred in appellee's answer, the "furnishing of electric and gas lighting to the said city of Helena and the inhabitants thereof" (Record p. 47.) Certainly there is nothing in the bill of complaint which can justify the conclusion that the defendant company was formed under the railroad corporation acts, but much from which the contrary is inferable. Indeed,, as to this very corporation the Supreme Court of the state in State vs. Helena Power and Light Company, 22 Mont., 393-394

decided in 1899, had the following to say: "It does not appear that the charter of respondent or the statute under which it was organized requires it to maintain or operate a line of railway; nor is it claimed that the State has delegated to respondent the right to exercise the power of eminent domain. It does not appear indeed whether it owes its existence to a special act of the legislature or to a compliance with the terms of some general act authorizing the formation of corporations thereunder. At the argument the statement was made that respondent was organized and exists under Chapter XXV, Division 5, Compiled Statutes of 1887, entitled 'Corporations for Industrial or Productive Purposes,' but nothing contained in that chapter may be so interpreted as to impose upon the respondent the obligation to continue the operation of any portion of its system of railways."

If the Supreme Court of Montana had regarded this as a railroad corporation, it must be assumed, it would have granted the mandamus sued for in that case, for it is a settled rule that a railroad corporation may be compelled by mandamus to operate its line.

3 Cook on Corporations (4th Ed.) Sec. 903.

It could not have been formed under any special act of the legislature for the granting of private charters was forbidden to the territorial legislature by the Organic Act,

U. S. Rev. Stat., Sec. 1889;

and to the state legislature by the constitution,

Article V, Sec. 26 and Article XV, Section 2.

As the record shows it was organized under the laws of

the State of Montana. (Record pp. 3, 48, 50.) The conclusion, therefore, of the learned Circuit Judge that said company was formed under said railroad incorporation acts is clearly not supported by the facts before the court.

Under what law of Montana, in force prior to July 1, 1895, could such a company as this one formed for the purposes aforesaid, have been incorporated? The answer, we submit, is plain; that relating to incorporations for industrial and productive purposes, as enumerated in section 446 of the Compiled Statutes, above quoted. This statute was before the Supreme Court of Montana in 1888 and was then construed, that court saying:

"The defendant further alleges that plaintiff (appellant) is a corporation duly organized under the laws of Montana Territory, * * * * The answer denies all the allegations of the complaint, and denies that plaintiff is a corporation, or that it has legal capacity to sue defendant. The cause was tried by the court without a jury. Upon the trial of the issues thus raised by the pleadings, the plaintiff offered in evidence the articles of incorporation of the Carver Mercantile Company, duly certified by the secretary of the territory; also copy of same articles duly certified by the County Clerk of Gallatin County as correct, and as being of record in the recorder's office of that county. Counsel for defendant objected to the introduction of said articles in evidence. The court sustained the objection, and refused to admit said articles in evidence. After the evidence on both sides was completed, the court filed its written findings of fact and conclusions of law, which, briefly stated, were

that the defendant was personally liable on the bill sued for; but the plaintiff was not competent to sue, not being a corporation created by law; the territorial leigslature not having the power under act of Congress to provide by law for the formation of trading or mercantile corporations. This is the only question presented by the record; and the appeal is prosecuted for the purpose of having this question determined. Section 1889 of the Revised Statutes of the United States, as far as it relates to the legality of the corporation now under consideration, is as follows: "The legislative assemblies of the several territories shall not grant private charters or especial privileges; but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, or other industrial pursuits." The legislature of the territory, acting under the limitation contained in this law, or intending to act under its limitation, in 1872 passed a law for the formation of corporations for industrial or productive purposes. Without reciting at length the first section of this act, it enumerates many of the purposes for which corporations may be formed, and among these trading and commercial corporations are not mentioned; but a general clause contained in the section authorizes the formation of corporations for "carrying on any other branch of business designed to aid in the industrial or productive interests of the country, and the development thereof." It is presumed that the corporation plaintiff, if it has any legal or corporate existence, was formed under this general provision of the act above referred to.

We know of no other law of the territory under which it could be formed, and the question recurs whether a corporation for mercantile purposes was authorized under this act. And this, in its turn, involves the validity of the act of the legislature, and whether it contravenes the act of Congress referred to. We are referred to only one case in the briefs on either side in which the words "industrial pursuit" have received judicial construction. This was the case of Wells, Fargo & Co. vs. Railway Co., 23 Fed. Rep. 469, decided in the United States Circuit Court for Oregon, in which it was held that the express business is an "industrial pursuit," and one which the territorial legislature could provide for the formation of corporations to engage in. It would be somewhat difficult to say in what respect an express business is an industrial pursuit and a mercantile business is not. "Industry" is defined by lexicographers to be "Habitual diligence in any employment, either bodily or mental;" and "industrial" as consisting in or pertaining to industry. These definitions are surely as applicable to the sale of goods, which is the chief business of a merchant, as to the transportation of goods, which is the chief business of an express carrier. They are alike "industrial," and if the legislature could authorize the formation of a corporation for one of these purposes it could for the other."

Carver Mercantile Co. vs. Hulme, 7 Mont., 571.

Surely if a corporation formed for mercantile purposes or for the expres business is one authorized under the power contained in the words "or of carrying on any other branch of business designed to aid in the industrial

or productive interests of the country and the development thereof" then one formed for manufacturing and furnishing gas, electricity and operating a street railway must also be one. It is conceded that this corporation has and had a legal status. It could not have been formed under the railroad incorporation acts as the furnishing of gas, electricity and street railway facilities are clearly *ultra vires* of railroad corporations, 1 Wood on Railroads, Secs. 169-170; necessarily therefore it must have been formed under section 446, *supra.* The maxim *ut res magis valeat quam pereat* is applicable. And consequently it follows that section 707 of the Compiled Statutes under the interpretation placed upon it in Massachusetts Loan & Trust Co. vs. Hamilton 88 Fed. 589 has no application to this corporation nor to the case at bar, and appellee is not entitled to any relief by reason of it. The reasons which might be advanced for the enactment of such a statute as said section 707 are utterly absent when applied to the business of a gas or electric company, and yet by reason of the part of the decree appealed from not only is the street railway property of the defendant company subjected to the claim of appellee but also all its other property.

Second. Is appellee entitled to relief by reason of section 17 of Article XV of the Constitution of Montana? From the passages, quoted above, of the appellee's answer it will appear that he is attempting to deduce the conclusion that because the defendant, the Helena Power and Light Company, in conducting the various branches of its business under permission, or as he calls them "fran-

chises" from the city of Helena to occupy portions of certain streets of said city, such "franchises" and the property used in connection therewith are not transferable except in subordination to claims against the company which were not only in existence at the time of such transfer but which might thereafter come into existence. What is the nature of such "franchises" from the city? In Montana a municipal corporation may not create corporations, it may not grant a franchise to be a corporation but it may under the terms of section 12 of Article XV of the Constitution give its *consent* to the occupancy of its streets by street railways, and under subdivison XVI of section 325 of the Compiled Statutes of Montana it might "license and authorize the construction and operation of street railroads." Such privilege was held by the Supreme Court of Montana in State ex rel Knight vs. Helena Power and Light Company, 22 Mont., 391 to be in the nature of a license or permission merely and not the granting of a franchise which imposed upon the grantee the legal duty to maintain and operate its property and the case of San Antonio St. Ry. Co. vs. State, 90 Tex., 520, 35 L. R. A. 662, was there cited with approval.

"A distinction is to be made between a street railway franchise granted by the legislature, and the permission of a municipality to the occupation of the streets by a railway company; the latter is not a franchise but a license which may be forfeited or abandoned."

23 Am. & Eng. Ency. of Law, 977.

Galveston City Ry. Co. vs. Galveston St. Ry. Co. 63 Tex. 529.

Chicago City Ry. Co. vs. People, 73 Ill. 541.

Belleville vs. Citizens Horse R. Co., 152 Ill. 171.

People vs. Rome W. & O. R. Co., 103 N. Y. 106.

Northern P. Ry. Co. vs. Washington, 142 U. S. 498.

Permission conferred on a street railway company to use streets is a mere license.

Atchison St. Ry. Co. vs. Move 17 Pac. 587.

It is well settled that "there is a distinction between the different classes of railroad franchises. The franchise to be a corporation is not the subject of sale and transfer, unless the law by some positive provision made it so, and pointed out the modes in which such sale and transfer may be affected. But the franchises to build, own and manage a railroad and take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons and there is nothing in their nature inconsistent with their being assignable."

New Orleans &c. R. R. Co. vs. Delamona, 114 U. S. 507-508.

The franchise or right to build, own and manage a railroad and take tolls thereon being asignable, the limitation on the power of the legislature contained in section 17 of Article XV of the Montana Constitution, it is submitted, applies only to corporate rights as are not generally held to be the subject of transfer, i. e. the right to be a corporation and the right to transact business as such. Such rights, privileges, franchises, if you please, as those granted by the city of Helena, and the property used in connection with the same, could not have been within the

intent of such section as otherwise it would be applicable to a transfer of its property by any corporation, e. g. one for mining or irrigation purposes, or for any purposes permitted by the incorporation statutes of the state. But it is clear that the section in question could have no application to such facts as we have in this case. It relates at most to liabilities which had their existence, which were "contracted or incurred" at and prior to the time of the transfer. To give it the meaning contended for by appellee there would have to be read into it some such phrase as the following: "or which may thereafter be contracted or incurred." But to do this would violate one of the cardinal rules of construction, which in Montana is crystallized into a statute, namely, section 3134 of the Code of Civil Procedure, "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted."

In the construction of a constitution the same rule applies as in the construction of statutes. The Supreme Court of the United States in Webster vs. Cooper 14 How. 504 says:

"The question has usually been concerning the construction of a statute of a state. But we think there is no sound distinction between the construction of a law enacted by the legislature of a state, and the construction of the organic law, ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the state, and its de-

cision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their constitution; and this Court receives such a settled construction as part of the fundamental law of the state."

See also People vs. Potter 47 N. Y. 375.

"A constitution should be construed according to the natural and most obvious import of the language used therein."

Rassmussen vs. Baker, 50 Pac. 821 and cases cited.

Law vs. People, 87 Ill. 385.

Martin vs. Hunter, 1 Wheat. 304.

It is not a violent presumption to suppose that if the makers of the Montana constitution intended by it to deprive a person of property and property rights acquired in 1895 by a subsequent act of omission or commission had in 1901, not by the owner of such property but by his grantor, then they would have said so in unmistakable language, and in the absence of it it cannot be assumed. Persuasive evidence that the legislature did not so construe the section in question is found in the fact that the legislature in the adoption of the Civil Code re-enacted section 707 of the Compiled Statutes as section 914 of the Civil Code. There was no necessity for this if the constitutional section is susceptible of the construction contended for by appellee.

Somewhat in point is the construction placed upon the statute, Code section 1255, of North Carolina, which provides that mortgages of incorporated companies upon their property or earnings, whether in bonds or other-

wise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in courts of this state against such corporation for labor performed or material furinshed such corporation, nor for torts committed by such corporation, its agents or employes, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding. Referring to it the Supreme Court of that state in Antietam Paper Co. vs. Chronicle Pub. Co., 115 N. C. 143 20 S. E. Rep. 366 says:

"Several of the creditors claimed priority over the above mentioned mortgagee under section 1255 of the Code. They insist that the articles in question (paper, ink, gas, a cut of Santa Claus, and the like) are "materials furnished" within the above provision. Without discussing the various authorities cited on the argument, we are content to adopt the construction placed upon the statute by this court in Traders Nat'l Bank vs. Lawrence Manuf'g Co., 96 N. C. 298, 3 S. E. 367. The court said: "We are disposed to concur in the view of counsel for the appellant, Hall, that the section so far as it relates to claims for labor performed or material furnished, pursuing very nearly the words used in section 1781 was designed by its disabling effect, to more effectually secure the liens given by the constitution to the laborer (article 10, sec. 4,) and the statute extended the lien to materials furnished; but the lien is further extended to torts, and compensation is provided against any alienation attempted to defeat the claim. After holding that, under the cir-

cumstances of that case, machinery or other articles purchased abroad, and used in putting up a mill or facilitating its working afterwards" was not within the act, Smith, C. J., remarked that "the consequences would be pernicious and destructive of all fair and safe dealings with corporations, if a secret lien founded upon a sale by a distant creditor, of which a person had no information, or means of information provided by law, could be set up as paramount to his demand; and unless imperatively demanded, such a construction ought not to be put upon an enactment as will lead to this result. We have examined the numerous authorities to which we have been referred by counsel, but they do not, in our opinion, sustain the contention that the articles furnished by the appellants are embraced by the statue. It is sufficient to say that these articles, which in no sense are attached to or enhance the value of the property, cannot be considered as within the spirit or letter of the act." This ruling was affirmed in Heath vs. Big Falls Cotton Co. 115 N. C. 202, 20 S. E. Rep. 369. In that case the prior mortgage was held a valid prior lien over claims for property sold and delivered to the mortgagor company, the court says:

"His honor was also correct in his ruling that the debts of the plaintiffs and others, arising from cotton and flour sold and delivered to the defendants, are not entitled to priority over the said mortgage. Antietam Paper Co. vs. Chronicle Pub. Co. (at this term) 20 S. E. 366."

But much more directly in point is the case of Klosterman vs. Mason Co. C. R. R., 8 Wash. 281, 36 Pac. 136. The constitutional provision there referred to is Article XII, Sec. 8 of the Washington Constitution, which reads:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

The facts of that case were substantially as follows: Klosterman had a claim for goods sold and delivered to the corporation (one formed to build and operate a railroad and to carry on a general lumbering and sawmill business) prior to July 20, 1891, and on that day he began an action against it for the same. Prior to this date the corporation had mortgaged its property to one Mason and on July 27, 1891 in consideration of its mortgage debt and of $1,200 sold and conveyed its property to him. When this conveyance was made the corporation owed other parties including Klosterman, but of that fact Mason had no knowledge. On this state of facts Klosterman among other things contended that the sale to Mason was in contravention of said Article XII, Sec. 8 and necessarily void as to him. But the court rejected this conclusion, saying: "In this case there is no showing that the appellant corporation ever acquired any of its property except by purchase and under those circumstances it was under no obligations to the public to retain its property or to continue its business, longer than it deemed it expedient to do so. In other words no one but its creditors had a right to question the disposition it made of its property * * * * The learned counsel for the respondent and the intervenors insist that, by virtue of the above cited provision of the constitution, the property in ques-

tion is still subject to the claim of the respondent. But we are not of that opinion. That provision declares, in effect, that, if a corporation shall lease or alienate its franchise, neither the franchise nor property held thereunder, shall thereby be relieved from liabilities contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges. This is but a declaration of what the courts have generally held to be the law, irrespective of constitutional limitations or provisions. Chicago, M. & St. P. Ry. Co. vs. Third Nat. Bank of Chicago, 134 U. S. 276, 10 Sup. Ct. 550. But we do not think that there is anything in the law, or this provision of the constitution, which inhibits a corporation from voluntarily transferring property for the payment of debts for which the property so transferred is legally bound."

The State of Utah has the same constitutional provision as that of Washington above quoted, being Article XII, Sec. 7. This provision was invoked by counsel and construed by the Supreme Court of Utah in the case of Wyeth Hardware & Manufacturing Co. vs. James Spencer-Bateman Co., 47 Pac. 604. The facts of this case were that the defendant company being insolvent made a preferential assignment of all its property for the payment of certain of its debts then existing. The plaintiff whose claim was not among the preferred claims brought suit to set aside the deed of assignment and to have the assets of the defendant company declared a trust fund for the payment of the creditors, and the constitutional provision against alienations of corporate property was relied upon by the plaintiff in its suit. The Supreme Court of Utah

at considerable length, and reviewing the authorities, discusses and upholds the right of an insolvent corporation to make an assignment of all its property and prefer certain of its creditors just as an individual may do; and in disposing of the constitutional question say:

"The provisions of the constitution which it is claimed affect the question under consideration are contained in Art. XII, Sec. 7 of which reads: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor or grantee contracted or incurred in the operation, use or enjoyment of such fanchise or any of its privileges." This section simply prohibits a corporation from leasing or alienating its franchise, so as to relieve the franchise or property from the liabilities of the lessor or grantor cr grantee; but it does not prohibit any corporation from conveying its corporate property to a trustee for the purpose of subjecting it to such liabilities, and the defendant company by conveying its corporate property expressly for the purpose of subjecting it to liabilities of the grantor, committed no act in contravention of this provision of the constitution."

The conclusion reached by the Utah court in this case is the same as that announced by the Supreme Court of Montana in Ames & Frost Co. vs. Heslett, 19 Mont., 188, decided in 1897, and while said section of the constitution was in full force, wherein this language was used:

"The great weight of authority is against apellants, and, in our opinion, is based on the better line of reasoning. In many of the cases cited, particularly those in the

Federal Courts, the statement is made that the assets of a corporation are a trust fund for the creditors; but it does not follow that even these courts intended by this expression to hold that creditors, by virtue of their mere attitude as such, have any lien upon the actual tangible property of a corporation—that property which belongs to it for its business operations and which is primarily liable for its debts, as distinguished from any secondary liability of directors or stockholders. In our opinion there is no such lien. The trust fund doctrine as invoked by appellants to sustain it, impresses us as an unsubstantial theory, constructed of judicial expressions selected without regard to their context or the facts in reference to which they were uttered. We refer, of course, to the cases where the adoption of the doctrine only appears inferentially. * * * * There is nothing in the statutes of Montana in force when this controversy arose forbidding such assignments, and, according to a large majority of the authorities, insolvent corporations and insolvent individuals are upon the same plane at common law in respect to them."

See also the decision of this court in Coler vs. Allen, 114 Fed. 609.

Concerning those provisions of the Washington and Utah constitutions it will be observed that they are practically the same as that of Montana, being, however, of broader effect in that they are direct limitations upon the corporation itself; and as to the facts, in that the claims referred to in the above cited cases were in existence at the time of the transfers and not as in the case at bar one

which had its inception more than six years after the mortgage. To construe the section in question as appellee contends would not only nullify the registration laws of the state but in the present instance would deprive the appellant, Central Trust Company of a substantial portion of its property and leave it entirely remediless, for the bill of complaint avers (Record p. 9): "Your orator is informed and believes that the defendant Helena company is insolvent and wholly unable to pay its debts and obligations and that the property and premises covered by said mortgage are of a value less in amount than the amount of the bonds issued hereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds," and the decree finds (Record p. 63): "That the defendant Helena company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by said mortgage are of a value less in amount than the amount of the bonds issued hereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of said bonds," and this too, as the result of a case (the suit of Warren vs. the Helena Power and Light Company) to which it was not a party and in which it had no opportunity to be heard. This, we submit, would be plainly violative of section one of Amendment XIV to the Federal Constitution.

The prohibition in the Fourteenth Amendment to the Constitution of the United States against any state depriving any person of life, liberty or property without due

process of law applies to corporations as well as natural persons. In other words, a corporation is a person within the meaning of this provision of the Constitution of the United States.

Covington & L. Turnpike Co. vs. Sandford, 164 U. S. 591.

The right which a mortgagee under a mortgage, or the trustee under a trust deed in the nature of a mortgage, has by virtue of such mortgage or trust deed, to have the property described therein aplied to the satisfaction of the indebtedness secured thereby, constitutes property. The principle is well established that to constitute due process of law there must be notice and an opportunity for a hearing, or, in other words, a party must have his day in court. Mr. Cooley in his work on Constitutional Limitations, page 432, says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; the law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial.'"

Pennoyer vs. Neff, 95 U. S. 715.

Rees vs. Watertown, 86 U. S. 107.

Co. of San Mateo vs. S. P. R. Co., 13 Fed. 762.

Stuart vs. Palmer, 74 N. Y. 190.

Hutson vs. Protection District, 79 Cal., 90.

Chauvin vs. Valiton, 8 Mont., 451.

Tay vs. Hawley, 39 Cal., 93.

Lowry vs. Rainwater, 35 Am. Rep. 420.

Scott vs. McNeal, 154 U. S. 43.

The learned judge of the Circuit Court was clearly right, we submit, in saying that he did not consider that the section of the Montana Constitution in question had any application to this case.

In conclusion, we respectfully submit that there is nothing in the laws of Montana applicable to such a case as the one here presented which gives priority to a claim originating in 1901 over a valid grant made in 1895; that the Circuit Court erred in holding otherwise and in rendering the decree complained of and that the same should be reversed.

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